Supreme Court, U.S.
FILED

02 1724 MAY 22 2003

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No. 02-

IN THE

Supreme Court of the United States

SECURITIES AMERICA, INC.,

Petitioner,

v.

CHARLES P. ROGERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

Under the Federal Arbitration Act, does the severability doctrine insulate arbitration agreements found in other agreements from allegations that the underlying agreements are illegal where no challenge is made to the legality of the arbitration agreement itself?

PARTIES TO THE PROCEEDINGS

The Petitioner is Securities America, Inc.

The Respondents are the following individuals who were parties to the proceedings below: The Singatory Plaintiffs were Adrian Ringland, Jr., Adrian Ringland, III, Bertha Ringland, George Edwards, and John Taliaferro. The Non Signatory Plaintiffs were M. Khris McAllister, Robert F. McCollough, Charles P. Rogers, Margaret Rogers, and William S. Ringland.

Scott Jonathon McKay Wolas a/k/a Robert Francis McDowell a/k/a Allen Lee Hengst and "Fictitious Parties A-E" were named as Defendants in the Circuit Court of Jefferson County Alabama, but were never served and did not participate in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Securities America, Inc. is wholly owned by Securities America Financial Corporation, which is wholly owned by American Express Financial Corporation, which is wholly owned by American Express Company.

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PETITION FOR A WRIT OF CERTIORARI

Securities America, Inc. ("SAI") respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The Jefferson County Circuit Court's order denying Petitioner's motion to compel arbitration (Pet. App. 15a), and the Alabama Supreme Court's opinion affirming that judgment (Pet. App. 1a-14a), are unpublished. They are both reproduced in the appendix.

STATEMENT OF JURISDICTION

The judgment of the Alabama Supreme Court was entered November 8, 2002. A timely motion for rehearing was denied February 7, 2003. (Pet. App. 16a.) On May 8, 2003, Justice Kennedy, as Circuit Justice, granted a 15 day extension of time in which to file this petition through and including May 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, 2, 3 and 4 are reproduced in the appendix (Pet. App. 17a-19a).

The relevant provisions of Alabama law are also reproduced in the appendix. (Pet. App. 19a-20a).

STATEMENT OF THE CASE

The decision of the Alabama Supreme Court in this case is an example of judicial hostility to enforcement of arbitration clauses. In this case it is undisputed that the arbitration agreements were actually made, affect interstate commerce and

cover the Plaintiffs' claims. Nevertheless, the Alabama Supreme Court refused to compel arbitration, and in so doing made no mention whatsoever of federal law, though it was emphasized by Petitioner. It was the eradication of such hostility that motivated the adoption of the Federal Arbitration Act and this Court's expansion of its application to the fullest reaches of Congress' power under the Commerce Clause. *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).

Indispensable to substantive federal law of arbitration is the "severability" doctrine. "That the Arbitration Act envisages a distinction between the entire contract between the parties on the one hand and the arbitration clause of the contract on the other is plain on the face of the statute." *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409 (2nd Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960). Under the severability doctrine, which is clearly ordained in the text of the Federal Arbitration Act at §§ 2 and 4, a general attack on the validity of the underlying agreement does not affect the validity of the separate and distinct arbitration agreement. Thus, in considering a motion to compel arbitration, the statute focuses the court's attention upon the question of whether there is an issue as to "the making of the agreement for arbitration or the failure to comply therewith." 9 U.S.C. § 4. If not, the court "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*; *Prima Paint*, 388 U.S. at 403-404. A claim which goes only to the validity of the underlying agreement, such as fraud in the inducement, does not affect the validity or enforceability of the "separate" agreement to arbitrate, and so does not create an issue as to "the making of the agreement for arbitration," and therefore cannot be considered in passing on a motion for stay or to compel arbitration. *Id.* at 404. The only claim that may be considered in

the context of a motion for stay or to compel arbitration is one that actually does create an issue as to the making of the agreement to arbitrate specifically, such as fraud in the inducement of the agreement to arbitrate, lack of consent, etc. *Id.*

Consequently, where the attack on the underlying contract does not raise any issue as to the making of the arbitration agreement, and the attack on the underlying contract is within the scope of the issues the parties agreed to arbitrate, courts have routinely ordered that claims of fraud in the inducement and other similar generalized attacks on the underlying agreement be decided by an arbitrator rather than a court. This is the teaching of *Prima Paint.*

To avoid the arbitration they plainly agreed to, Respondents attacked their underlying customer agreements with SAI as being unenforceable under the Alabama Securities Act on the grounds that the man with whom they dealt did not hold a securities license in his real name – Scott Wolas – though he was licensed in the name of the assumed identity by which he was known to both Petitioner and Respondent in all their dealings with him – Allen Lee Hengst. Neither Petitioner SAI nor Respondents had any inkling that Allen Lee Hengst was not who he appeared to be, fully and properly licensed, until *after* he had absconded. Under the Alabama statute, it is unlawful to transact business as a dealer or agent for securities without a license, and no one who makes or performs a contract in violation of this requirement can enforce such a contract. Ala. Code §§ 8-6-3, 8-6-19(g). It is undisputed that Respondents' claims are within the scope of the broad arbitration clause here at issue, that the parties in fact agreed to arbitration, and that the attack is not on the arbitration agreement particularly, but on the underlying agreement generally. On these facts, and in the face of the plain text of the FAA, and the established precedents of this Court to the contrary, the Alabama Supreme Court concluded that the illegality of the underlying agreement is not severable from and

is fatal to the arbitration agreement, and that a court, not an arbitrator, should address and resolve issues that are otherwise plainly within the scope of the arbitration agreement.

This conclusion by the Alabama Supreme Court is directly contrary to the Federal Arbitration Act and this Court's decisions applying it from *Prima Paint* forward, as well as the decisions of most other courts that have directly addressed the issue. Certiorari should be granted (1) to revisit for the benefit of the Alabama Supreme Court the contours of the supremacy of federal substantive law governing arbitration agreements, *see, e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995), (2) to correct the other courts that have likewise gone astray in this area, and (3) to eliminate the mischief arising from doctrinal confusion that has crept into the decisions of several circuit and state courts.

I. Statutory Background

1. Federal Statutes

The FAA provides that written arbitration provisions shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Furthermore, a court, state or federal, is under an obligation to stay proceedings in that court "upon any issue referable to arbitration under an agreement in writing for such arbitration. . . ." 9 U.S.C. § 3. Once a demand for arbitration is made by one party and opposed by another, the demanding party may petition the court to compel arbitration of that dispute. 9 U.S.C. § 4. If the court is satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue," the FAA requires that court direct the parties to arbitrate disputes whenever the parties have signed an agreement requiring them to do so. *Id.* However, if issues exists regarding the making of the arbitration agreement, the court is required decide these issues. *Id.*

In *Allied-Bruce Terminix Cos, Inc,. v. Dobson, supra,* also on certiorari from the Supreme Court of Alabama, the Court explained the historical backdrop and purposes of the Federal Arbitration Act, 9. U.S.C. § 1, *et seq.*:

> First, the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488 (1989). The origins of those refusals apparently lie in "'ancient times,'" when the English courts fought "'for extension of jurisdiction – all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'" *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 211, n.5, 76 S. Ct. 273, 280, n.5, 100 L. Ed. 199 (1956) (Frankfurter, J., concurring) (quoting *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915), in turn quoting *Scott v. Avery*, 5 H.L.Cas. 811 (1856) (Campbell, L.J.)). American courts initially followed English practice, perhaps just "'stand[ing] . . . upon the antiquity of the rule'" prohibiting arbitration clause enforcement, rather than "'upon its excellence or reason.'" *Bernhardt v. Polygraphic Co., supra*, 350 U.S., at 211, n.5, 76 S. Ct., at 280, n.5 (quoting *United States Asphalt Refining Co., supra*, at 1007). Regardless, when Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a . . . desire" to change this antiarbitration rule. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158 (1985). It intended courts to "enforce [arbitration] agreements into which parties had entered," ibid. (footnote omitted), and to "place such agreements 'upon the same

> footing as other contracts,'" *Volt Information Sciences, Inc., supra*, 489 U.S. at 474, 109 S. Ct., at 1253 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 2453, 41 L. Ed. 2d 270 (1974).

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. at 270.

In order to carry out the purposes of the Arbitration Act, this Court has extended its reach "to the limits of Congress' Commerce Clause power." *Allied-Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265, 270. In addition, the Court has held that federal arbitration law is substantive in nature, is applicable in both state and federal courts and pre-empts any contrary state law, whether statutory or judge-made:

> In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 1, 25, and n.32, we reaffirmed our view that Arbitration Act 'creates a body of federal substantive law' and expressly stated what was implicit in *Prima Paint*, i.e., the substantive law the Act created was applicable in state and federal court.

Southland Corp. v. Keating, 465 U.S. 1, 12 (1984); *Allied-Bruce, supra*, 513 U.S. at 270. "In enacting § 2 Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 US at 10.

2. Alabama Statutes

Alabama Code § 8-6-3, part of the Alabama Securities Act, provides that it is "unlawful" for any person to transact business in the state as a dealer or agent for securities, as an investment adviser or an investment adviser representative unless he or she are registered under the Alabama securities statutes. Section 8-

6-19(g) provides that contracts made or performed in violation of this provision are unenforceable:

> No person who has made or engaged in the performance of any contract in violation of any provision of this article or any rule or order hereunder or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any action on the contract.

The purpose of the Alabama Securities Act is to "protect the public from fraudulent, dishonest, or unethical practices in the securities business." *Securities America, Inc. v. Rogers*, (Pet. App. 10a); Comment to Ala. Code § 8-6-3. To carry out this policy, the Alabama Supreme Court construed both § 8-6-3 and § 8-6-19 "most favorably to the public." (Pet. App. 10a, 11a).

II. Factual Background

Defendant SAI is a broker-dealer registered with the United States Securities and Exchange Commission and is a member of the National Association of Securities Dealers (the "NASD").

In May, 2000, SAI registered a securities representative under the Alabama Securities Act. This man was registered under the name "Allen Lee Hengst", the name by which he was known and registered during three previous years of employment in the securities business and the only name by which he was known at the time to either Plaintiffs or SAI.

The Plaintiffs' claims stem from their dealings with "Hengst". Unbeknownst to either the Plaintiffs or SAI, "Hengst" was an assumed name. The true, and secret, identity of "Hengst" was Scott Wolas.

The real Allen Hengst is a law librarian, and was Wolas' college roommate. The real Hengst will be referred to as the "Librarian" to distinguish him from the "Hengst" identity assumed by Scott Wolas.

Wolas surfaced in Orlando, Florida in 1997, and obtained a securities license using the Librarian's name and Social Security number. He worked for three years with the brokerage firm Chatfield Dean and its successor, J.W. Genesis (collectively "Genesis"). In May 2000, Wolas, using the name "Hengst," became registered with SAI.

During the time he was employed by Genesis and SAI, and unbeknownst to SAI, "Hengst" operated a Ponzi scheme in which he persuaded both customers and noncustomers of SAI to invest with him personally in gold certificates. Plaintiffs below were among those who invested in this Ponzi scheme, and lost money.

Five of the ten Plaintiffs below, Adrian Ringland, Jr. Adrian Ringland, III, Bertha Ringland, George Edwards, and John Taliaferro (the "Signatory Plaintiffs") opened brokerage accounts and signed New Account Agreements with SAI.[1]

The New Account Agreements contain the following language directly above the customer signature line:

> I HEREBY ACKNOWLEDGE THAT I AM IN RECEIPT AND HAVE READ, UNDERSTOOD AND AGREED TO THE TERMS SET FORTH IN THE SAI CLIENT AGREEMENT AND THAT THIS ACCOUNT IS GOVERNED BY A PRE-DISPUTE ARBITRATION AGREEMENT WHICH I HAVE READ AND UNDERSTAND.

(Pet. App. 3a.)

The Pre-Dispute Arbitration Agreement to which this passage refers is found in the SAI Client Agreement. It is given

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1. SAI moved to compel the five other "Non-Signatory Plaintiffs" to arbitrate. The trial court denied that motion and the Alabama Supreme Court affirmed that denial. Those claims are not the subject of this petition.

to all prospective SAI customers before they sign the New Account Agreement. The Arbitration Agreement provides in relevant part:

> I AGREE THAT ALL CONTROVERSIES THAT MAY ARISE BETWEEN US CONCERNING ANY ORDER OR TRANSACTION, OR THE CONTINUATION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN US, WHETHER ENTERED INTO BEFORE, ON, OR AFTER THE DATE THIS ACCOUNT IS OPENED, SHALL BE DETERMINED BY ARBITRATION BEFORE A PANEL OF INDEPENDENT ARBITRATORS SET UP BY EITHER THE NEW YORK STOCK EXCHANGE, INC. OR NATIONAL ASSOCIATION OF SECURITIES DEALERS INC. AS I MAY DESIGNATE.

(Pet. App. 5a.)

In December, 2000 "Hengst" absconded. It was thereafter discovered that "Hengst" was actually Wolas. This litigation, and others like it, followed.

III. History of Proceedings

1. Proceedings before the Jefferson County Circuit Court

On October 19, 2001, the Plaintiffs filed a Complaint in the Circuit Court of Jefferson County, Alabama, against SAI and Wolas alleging that Plaintiffs had made financial investments with SAI by and through "Hengst."

On December 13, 2001, SAI answered the Complaint and asserted, among other defenses, that Plaintiffs' claims were subject to mandatory arbitration agreements and should be pursued, if at all, in arbitration. On that same day, SAI filed a

Motion to Dismiss, or Alternatively, to Stay and Compel Arbitration ("Motion to Compel Arbitration"). SAI argued that the Signatory Plaintiffs (who undisputedly signed the arbitration agreements) were required to arbitrate their claims under the clear and unambiguous authority of the Federal Arbitration Act. The Signatory Plaintiffs resisted arbitration, but in so doing conceded three important points: (1) the existence of and their assent to the arbitration agreements; (2) that the transactions in question substantially affected interstate commerce; and (3) that the arbitration agreements applied to their claims.[2] (Pet. App. 9a). The grounds of Plaintiffs' resistance to arbitration did not go to the making of the agreement to arbitrate. Instead, they contended that the underlying New Account Agreements were unenforceable under Alabama Code § 8-6-19(g) because Scott Wolas was not registered under the Alabama Securities Act in that name. The unenforceability of their New Account Agreements, they contended, also made the arbitration provisions within them unenforceable.

On February 1, 2002, the trial court denied the Motion to Compel Arbitration. On March 13, 2002, SAI filed its Notice of Appeal to the Supreme Court of Alabama.

2. The Alabama Supreme Court's Decision

The Alabama Supreme Court accepted the Plaintiffs' arguments and affirmed, holding that Ala. Code § 8-6-19(g) made the Customer Agreements, and hence their arbitration provisions, uenforceable.

Though Topic "A" in SAI's written argument to the Alabama Supreme Court was "The Federal Arbitration Act

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2. These concessions make it "clear and unmistakable" that the parties agreed to arbitrate the Plaintiffs' challenge to the legality of the underlying agreements with SAI. The question of arbitrability is therefore not for judicial determination. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 123 S. Ct. 588, 591 (2002).

Requires Arbitration of the Plaintiffs' Claims," the court's opinion devotes *not even a single word* to the issue. Instead the court held that "The violations of the Alabama Securities Act rendered the SAI customer agreements unenforceable by SAI. Therefore, SAI is not entitled to seek arbitration under the provisions of those agreements, and the trial court did not err in denying SAI's motion to compel the Signatory Plaintiffs to arbitrate their claims." (Pet. App. 13a). There was no discussion whatsoever of any federal statutes or any federal court decisions, though many were called to the Court's attention by SAI, including the FAA, and *Prima Paint* and its progeny. There was no discussion whatever of the severability doctrine. The court's discussion was limited entirely to whether the agreement as a whole was unenforceable under state law.

The Alabama Supreme Court cited *Alabama Catalog Sales v. Harris*, 794 So.2d 312 (Ala. 2001) to support its decision. In *Alabama Catalog Sales*, the plaintiff alleged her payday loan contract was illegal and void under the Alabama Small Loan Act, and argued that the arbitration agreement, being part of the payday loan agreement, was therefore also void and unenforceable. The court in *Alabama Catalog Sales* relied on its decision in *Shearson Lehman Bros., Inc. v. Crisp*, 646 So.2d 613 (1994), which in turn relied heavily on *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991), to hold that allegations that a contract was void for reasons of illegality created an issue as to the existence of the underlying agreement, and that this extended to the arbitration agreement. Accordingly, the challenge to the underlying agreement was a decision for the courts, not an arbitrator. 792 So.2d at 316-317. The Ninth Circuit in *Three Valleys*, *supra*, held that the controlling distinction on the question of arbitrability was between void and voidable contracts. According to this distinction (which is not found in the language of the FAA), *Prima Paint* required that claims that an underlying contract was merely voidable went to arbitration, while claims that it was "void" raised an issue as to

the making of the agreement to arbitrate which therefore remained for the court to decide. *Alabama Catalog Sales*, 794 So.2d at 315, n.1. *Alabama Catalog Sales* applied *Three Valleys's* doctrinal innovation – the void/voidable distinction – to conclude that if an agreement was illegal under the state usury statute, then it was void and did not exist, and that this illegality in the underlying contract was fatal as well to the arbitration agreement.

The opinion *SAI v. Rogers*, however, contained none of this exposition. The Court merely held that the agreements with SAI were unenforceable under the Alabama Securities Act and that this unenforceability extended to the arbitration agreements. The court therefore affirmed the denial of SAI's motion to compel arbitration.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted (1) to correct the manifest error of the Alabama Supreme Court, and reinforce the policies of FAA and this Court's many decisions on the subject; (2) to correct the other state courts that have likewise gone astray in this area, and (3) to eliminate the mischief arising from a certain doctrinal confusion that has crept into the decisions of several circuits and state courts and (4) to settle the extent to which the severability doctrine insulates an arbitration agreement from claims that the underlying agreement is illegal.

I. The Alabama Supreme Court Erred in Failing to Apply the Federal Arbitration Act and Relevant Supreme Court Decisions

In *Prima Paint* this Court considered the effect on an arbitration provision of an allegation that the underlying contract had been procured by fraud. The Court held that for purposes of deciding a motion to stay or compel arbitration under the Federal Arbitration Act, the terms of the FAA required that the arbitration clause be viewed as separate and distinct from the

underlying contract. 388 U.S. at 403. Under the severability doctrine, defects in the enforceability of the underlying contract, such as might arise from alleged fraud in the inducement of the underlying contract generally, did not affect the enforceability of the analytically separate and distinct arbitration agreement. "[T]he statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.* at 404. In the language of 9 U.S.C. § 4, such a claim does not put in issue "the making of the agreement to arbitrate" and so does not affect its enforceability. 388 U.S. 395, 404. In such a case, claims of fraud in the inducement of the underlying contract and other similar claims which do not suffice to put in issue the making of the agreement to arbitrate are to be decided by the arbitrator, provided such claims are within the scope of the arbitration agreement. *Id.* The "making of the agreement to arbitrate" could be put in issue by a claim that the *arbitration agreement itself* was specifically induced by fraud or was otherwise illegal. *Id.* at 403-4.

The Alabama Supreme Court erred by failing to consider or even mention controlling federal law on arbitrability. This Court has made clear that "the substantive law the Act created was applicable in state and federal court," *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984), to the limits of Congress' power under the Commerce Clause. *Allied-Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265, 270. Federal law requires enforcement of the parties' arbitration agreement in this case because, as in *Prima Paint*, the attack on the underlying agreement was merely that it was unenforceable, and did not relate specifically to the making of the agreement to arbitrate. There is no justification for the Alabama Supreme Court's failure to mention or apply controlling law. To devote not even a single word of the opinion to the relevant principles of federal law is an act of judicial defiance that cannot be allowed to stand.

II. The Social Policies of the Alabama Securities Act are No Impediment to Arbitration

In reaching its decision, the Alabama Supreme Court placed great reliance on the policies of the Alabama Securities Act. It explicitly referred to those policies in construing the facts to find a statutory violation, and in construing the knowledge element of § 8-6-19(g) to be of no help to SAI. "'Statutes intended for the public benefit are to be construed most favorably to the public.' [citations omitted]" (Pet. App. 10a). Yet this Court has made quite clear that the desirability of the social policies promoted by statutes has no bearing on the arbitrability of a dispute provided those policies may be vindicated through arbitration. As was explained in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000):

> [W]e have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (Sherman Act). We have likewise rejected generalized attacks on arbitration that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Rodriguez de Quijas, supra*, at 481, 109 S. Ct. 1917. These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because "'so long as the prospective

> litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,'" the statute serves its functions. *See Gilmer*, [*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).] *supra*, at 28, 111 S. Ct. 1647 (quoting *Mitsubishi*, *supra*, at 637, 105 S. Ct. 3346).

531 U.S. at 89. Plaintiffs have made no showing that they cannot effectively vindicate their rights as investors in arbitration. Accordingly, the public protection policies of the Alabama Securities Act furnish no support for refusing to enforce the parties' arbitration agreements as written.

III. Most Federal Circuit Courts Hold That The Alleged Illegality of the Underlying Agreement is Arbitrable

The question of the effect on arbitration agreements of state licensing and regulatory statutes that make illegal or unenforceable any contracts that do not comply therewith has been squarely considered in the Fourth, Fifth, Sixth, Seventh and Eleventh Circuits. In each case, the courts held that under the FAA, *Prima Paint* and the severability doctrine, the asserted illegality of the underlying agreement did not put the making of the arbitration agreement in issue and had no effect on its enforceability. *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (illegality of "pay day" loan agreement claimed to be void *ab initio* under state usury statute did not relate specifically to the arbitration clause, which was enforceable where there was no issue of assent or applicability); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159 (5th Cir. 1987) (alleged illegality of franchise agreement under Texas Accountancy Act did not affect enforceability of arbitration agreement under *Prima Paint*); *Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001) (illegality of "pay day" loan agreement from unlicensed lender claimed to be void *ab initio* under state usury statute and small loan licensing statute did not relate specifically to the arbitration clause, which was enforceable where there was no issue of assent

or applicability); *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress, Int'l*, 1 F.3d 639 (7th Cir. 1993) (unregistered franchise agreement subject to rescission under state law, but arbitration clause separable and enforceable under *Prima Paint*); *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000) (arbitration agreement enforceable under *Prima Paint* notwithstanding attack on underlying contracts as illegal under Commodities Exchange Act).

The Eleventh Circuit cases warrant fuller discussion because they correctly enforce arbitration agreements when there is no issue as to the making of the agreement to arbitrate, and correctly do not enforce them when there is, and do so without reference to the void/voidable test.

In *John B. Goodman L.P. v. THF Construction, Inc.*, 321 F.3d 1094 (11th Cir. 2003), the plaintiff brought fraud and RICO claims. The defendant moved to enforce the arbitration clauses in the parties' construction contracts. The plaintiff resisted arbitration, arguing that defendant was not a licensed contractor so the contracts were unenforceable under Florida law. The Eleventh Circuit sent the question of whether the underlying contract was unenforceable to the arbitrator because the plaintiff's challenge went to the substance of the contract and not to its existence, and created no issue as to the making of the arbitration agreement.

Of particular interest is *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), which involved a general attack on a pay day loan agreement as usurious and void *ab initio* under Alabama's Small Loan Act. The Court held that the allegations of illegality of the underlying loan agreement did not specifically put in issue the making of the arbitration agreement. Therefore, under *Prima Paint* an arbitrator rather than a court should decide those issues. The Court rejected plaintiff's reliance on *Chastain v. Robinson Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992), in which the court did not enforce an arbitration agreement where the plaintiff claimed her signature had been forged on the

contract in question and she, therefore, had never agreed to arbitrate any claims between her and defendant:

> Likening his void *ab initio* allegations to the contentions in *Chastain* that no contract ever existed, Colburn argues that, as in *Chastain*, the court must determine the legality of the deferred payment transactions before deciding whether to compel arbitration. But the focus of the court's decision in *Chastain* . . . was on the question of assent, i.e., whether the parties mutually had agreed to the contracts. By contrast, Colburn urges that the transactions in this case are void, not because he failed to assent to the essential terms of the contracts, but because those terms allegedly render the contracts illegal under Alabama law. At bottom, Colburn challenges the *content* of the contracts, not their *existence*. . . . Therefore, the issue raised by Colburn – whether the deferred payment transactions are void as illegal – is one for the arbitrator, not the court.

Bess v. Check Express, 294 F.3d at 1305-6. While the focus on content vs. existence is an abstraction from the statutory test of whether the making of the agreement to arbitrate has been put in issue, there can be little doubt that *Bess* is correctly decided. In light of *Goodman* and *Bess*, it is clear that had the case at bar been filed in federal court the arbitration agreement would have been enforced. In fact, when other victims of "Hengst" presented their claim to the Middle District of Florida, it applied *Bess* and enforced the arbitration agreement. *Dupont v. Securities America, Inc.*, Case No. 6:01-cv-1195 (M.D. FL 6/26/02). The Alabama rule therefore promotes forum shopping, contrary to the strong federal policy favoring uniform application of the substantive federal law of arbitrability "We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an

arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

The only remedy for what the Alabama Supreme Court has done is to grant this petition.

IV. Other States Have Similarly Erroneous Decisions

The result in the case at bar is not an isolated incident unworthy of the Court's attention. There are five other states – New Hampshire, Florida, Illinois, Colorado and South Dakota – with similar decisions.

In *Riverwalk Apartments, LP v. RTM General Contractors, Inc.*, 779 So.2d 537 (Fla. 2d DCA 2000) the court held that a party who offers colorable evidence a contract is illegal cannot be compelled to arbitrate the threshold question of existence of an agreement to arbitrate. *But see* contrary Florida cases discussed in *Goodman L.P. v. THF Construction, Inc.*, 321 F.3d 1094, 1097-1098 (11th Cir. 2003).

In *Aste v. Metropolitan Life Ins. Co.*, 312 Ill.App. 972, 728 N.E.2d 629 (2000) the Illinois Security Law voided the underlying agreement because a securities salesperson was not registered. The court held this invalidity was fatal to the arbitration clause and that the difference between the underlying agreement and the arbitration agreement under the severability doctrine was "a distinction without a difference."

In *Nature's 10 Jewelers v. Gunderson*, 648 S.W.2d 804 (S.D. 2002), the court held that the lack of a franchisor's license made the underlying agreement illegal and void. Adopting the void-voidable distinction from the Ninth Circuit case of *Three Valleys Municipal Water District v. Hutton & Co.*, 925 F.2d 1136 (1991), the court held that the invalidity extended to the arbitration agreement.

In *RPT of Aspen v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. Ct. App. Div. IV 1996) the underlying contract was claimed to be illegal under a state anti-trust statute and therefore void. The court held that the severability doctrine was not applicable to allegations that the whole contract was illegal, and refused to enforce the arbitration agreement.

Each of these states has committed the same or similar error as the Alabama Supreme Court. Collectively these cases raise the important question of the extent to which the severability doctrine insulates arbitration agreements from claims that the underlying agreement is illegal or void. The question has lead to a split of authority and a substantial lack of uniformity in the application of the federal law of arbitrability. The historical objective of the FAA and the Court's jurisprudence in this area has been to achieve uniform national enforceability of arbitration agreements. That policy is frustrated as long as these six states (including Alabama) are allowed to persist in their erroneous application of the Federal Arbitration Act.

V. Abstractions Like The Ninth Circuit's Void – Voidable Test Are Poor Proxies for the Actual Test in the FAA

Many of the courts that have refused to enforce arbitration agreements in contracts alleged to be illegal have relied on the Ninth Circuit case *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991) which articulated a "void-voidable" test.

The distinction between void and voidable contracts in *Three Valleys* has been adopted by other Circuits. For example, the Second Circuit in *Sphere Drake Ins. Ltd., v. Clarendon National Ins.*, 263 F.3d 26 (2nd Cir. 2001) adopted it as a way of deciding a defense to arbitration based on a claim that an agent had exceeded his contracting authority: "While the teachings of *Interocean* and *Prima Paint* may appear conflicting, they can be sensibly harmonized by understanding that their outcomes implicitly – if not explicitly – rely on the distinction between

void and voidable contracts, a distinction already recognized in at least two other circuits." *Id.* at 31, citing *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 106-07 (3rd Cir. 2000) and *Three Valleys* 925 F.2d at 1140. The Second Circuit summarized the void-voidable test as follows:

> If a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void, and the party is entitled to a trial on the arbitrability issue pursuant to 9 U.S.C.A. § 4 and the rule of *Interocean*. However, under the rule of *Prima Paint*, if a party merely alleges that a contract is voidable, then, for the party to receive a trial on the validity of the arbitration clause, the party must specifically allege that the arbitration clause is itself voidable.

Sphere Drake Ins. Ltd., v. Clarendon National Ins., 263 F.3d at 32. For examples of cases applying the void-voidable test, *see Alabama Catalog Sales v. Harris*, 794 So.2d 312 (Ala. 2001); *Party Yards, Inc. v. Templeton*, 751 S.2d 121 (Fla. 5th DCA 2000); and *Nature's 10 Jewelers v. Gunderson, supra.*

The difficulty with the void-voidable test is not that it lead to incorrect decisions in *Three Valleys* or *Sandvik* or the Second Circuit iteration of *Sphere Drake*. It is that the test is not the one codified in the FAA, and that it consequently leads to incorrect results as in *Alabama Catalog Sales* and *Party Yards*. The FAA's test is whether the "making of the agreement for arbitration" has been put in issue. 9 U.S.C. § 4. Cases in which there is a claim that the agreement was never signed such as *Sandvik AB, supra*, and *Chastain v. Robinson Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992), and cases in which there is a claim that an agent has exceeded his contracting authority such as *Three Valleys, Sphere Drake Ins., Ltd. v. Clarendon National Ins., supra,* are all cases in which the making of the arbitration agreement was thusly put in issue and were therefore properly

not sent to arbitration. In such cases it is not necessary to abstract from the statutory test to the void-voidable test to yield this result. *See Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002) (harmonizing *Three Valleys, Sphere Drake,* and *Sandvik AB* without using the void-voidable test). A useful discussion of these decisions and the statutory test is found in *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 487-92 (6th Cir. 2001). *See also Sphere Drake Ins. Ltd., v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (explaining cases in terms of statutory test).

The void-voidable test is not the only abstraction employed by courts struggling to decide questions of arbitrability. There are also such formulations as the assent model or substance/existence test in *Bess v. Check Express*; fraud in the inducement vs. fraud in the factum in *Cancanon v. Smith, Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986); the "permeation" test of *Green v Mt. Diablo Hosp. Dist.*, 207 Cal.App.3d 63, 254 Cal.Rptr. 689 (1989); and the "signatory power" test in *Burden*.

As the Sixth Circuit noted in *Burden*, "while the 'fraud in the factum/fraud in the inducement distinction may offer a legitimate means of analy[sis],' the distinction 'may more confound than clarify the dispositive issue and its resolution.'" *Burden*, 267 F.3d at 489, citing *C.B.S. Employees Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 913 F.2d 1563, 1566 (6th Cir. 1990).

The error, and the split of authority, which ensues from the void-voidable test can be seen in cases in which the underlying contract is alleged to be void or unenforceable for lack of compliance with a particular licensing statute. The Alabama Supreme Court's decisions in *Alabama Catalog Sales* and this case, and the South Dakota Supreme Court's decision in *Nature's 10 Jewelers v. Gunderson*, 648 S.W.2d 804 (S.D. 2002) are worthy examples. The underlying contract was alleged in each case to be illegal and void for lack of a license. Applying the

void-voidable test, these courts held that the alleged illegality placed the existence of the agreements in question, precluding arbitration of that claim. But in functionally equivalent fact patterns, and applying instead the statutory test of whether the making of the arbitration agreement had been put in issue, the Fourth Circuit in *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), the Seventh Circuit in *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress, Int'l*, 1 F.3d 639 (7th Cir. 1993), and the Eleventh Circuit in *Bess v. Check Express, supra*, held that such allegations do not put in issue the making of the arbitration agreement, but are instead merely challenge the substance or content of the underlying agreement.

In the case at bar, the alleged violations of the registration requirement of the Alabama Securities Act did not put in issue the making of the arbitration agreement. Consequently, SAI's motion to compel arbitration should have been granted.

VI. The Registration Requirement of the Alabama Securities Act Does Not Apply to "Any Contract," and so Cannot be Used to Invalidate an Arbitration Agreement

Apart from the failure to consider or apply controlling federal law, the decision reached in this case is contrary to § 2 of the FAA and this Court's binding precedents about the kind of contract defenses that may be relied upon to defeat an arbitration agreement. Section 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such grounds as exist at law or in equity for the revocation of *any* contract." (Emphasis added). In *Southland Corp. v. Keating*, *supra*, a provision of the California Franchise Investment Law made void any contract provision which purported to waive compliance with the law. 465 U.S. at 10. While the statute did not specifically invalidate arbitration agreements, it was construed to do so by the California Supreme Court. *Id.* In responding to a dissenting Justice, the Court's opinion made clear that contract defenses found in specialized regulatory codes like the California

Franchise Investment Law that are not generally applicable to "any contract" are not proper defenses to an arbitration agreement:

> Justice STEVENS dissents in part on the ground that § 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such grounds as exist at law or in equity for the revocation of any contract." We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. . . . If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements "upon the same footing as other contracts," H.R. Rep. No. 96, *supra*, 1, simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

Southland Corp. v. Keating, 465 US at 16, n.11. (Emphasis in original).

The same point was made in *Perry v. Thomas*, 482 U.S. 483, 492, n. 9 (1996) in the context of a state statute which was specifically directed against arbitration provisions in employment agreements. The Court held that Section 2 of the FAA preempted the statute, and explained the role of state law in determining questions of arbitrability:

> An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, see *Moses*

> *H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

Perry v. Thomas, 482 U.S. at 492 (emphasis in original). Under this reasoning, a statute directed specifically at arbitration clauses did not "comport with [the] requirement of § 2" that the grounds of state law attack be applicable to "*any* contract." *Id.*

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) also involved a state statute that was specifically directed at arbitration clauses and which imposed a special notice requirement. "Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." 517 U.S. at 687.

While these cases invalidated state laws that were directed specifically against arbitration clauses, the preemptive effect of § 2 of the FAA, by its plain terms, is not limited to that circumstance. State law defenses to arbitration that are limited to a particular kind of contract, or are drawn from a specialized regulatory code and are not applicable to invalidate "any contract," simply do not meet this requirement of § 2 and so have no effect on the validity of arbitration agreements. "We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Southland Corp. v. Keating*, 465 U.S. at 11. Thus, in *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) the Fifth Circuit, citing footnote 11 in *Southland* (quoted above) held that "Similarly, the Texas Accountancy Act of 1979 is not a ground that exists at law or in

equity for the revocation of any contract, and it cannot overcome the strong federal interest in arbitration."

Applying these principles to the case at bar it is quite evident that the asserted defense to arbitration, the unenforceability of contracts made or performed in violation of the registration requirement of the Alabama Securities Act, is not one that exists at law or equity for the revocation of "*any* contract." To cite just two examples, § 8-6-19(g) does not apply to contracts for the sale of goods, and does not apply to agreements to arbitrate, standing alone. Nor, under the doctrine of severability, does it apply to an arbitration agreement found in a customer agreement which is otherwise subject to the Alabama Securities Act. In plain terms, one does not need a state securities license just to make an agreement to arbitrate in the state of Alabama. Therefore, the Alabama Supreme Court decision to hold the arbitration agreement in this case unenforceable based upon § 8-6-19(g), a ground that does not exist for "any contract," was clearly contrary to § 2 of the FAA, *Southland*, *Perry* and *Doctor's Associates*.

VII. Certiorari Should Be Granted to Prevent The Policies of Federal Arbitration Law From Being Undermined

The policies behind federal arbitration law are to overcome judicial hostility to arbitration and to place arbitration agreements on an equal footing with other types of contracts. *Southland Corp. v. Keating*, 465 U.S. at 16-17, n.11. In addition, arbitration relieves crowded court dockets and resolves disputes with speed and finality. *Weinrott v. Carp*, 32 N.Y.2d 190, 298 N.E.2d 42 (1973) (justifying adoption of severability doctrine). These policies are frustrated by ill-conceived decisions that permit arbitration to avoided by the expedient of pleading non-compliance with a specialized licensing statute or with other state laws which invalidate contracts with illegal provisions. There are 39 states with securities statutes that invalidate

contracts that do not comply therewith.[3] Strong application of the severability doctrine is necessary to effectuate the purposes of federal arbitration law and defeat unceasing attempts to avoid it. If arbitration could be avoided upon the mere claim of fraud, there would hardly be any arbitration, "for it is easy to cry fraud." *Sphere Drake Ins. Ltd., v. All American Ins. Co.*, 256 F.3d at 590. The doctrine must also be strongly applied to state legislative attempts to limit arbitration. "If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements 'upon the same footing as other contracts,' . . . simply by passing statutes such as the Franchise Investment Law." *Southland Corp. v. Keating*, 465 U.S. at 16-17, n.11.

The new threat to federal arbitration law arises from a weakening of the severability doctrine through the use of state licensing statutes as pretexts to invalidate arbitration agreements that would clearly be enforced were the matter presented in federal court. Each state has literally dozens of specialized regulatory statutes which invalidate, to one degree or another, contracts within their scope that do not comply with their

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3. Alaska Code § 45.55.930(g); Arkansas Code § 23-42-106(g); Colorado Code § 11-51-604(10); Connecticut Code § 36b-29(h); Delaware Code § 7323(f); Idaho Code § 30-1446(4); Indiana Code § 23-2-1-19(h); Iowa Code § 502.502A(2); Kansas Code § 17-1268(d); Kentucky Code § 292-480(6); Maine Code Code § 10608(1); Maryland Code Code § 11-703(g); Mass. Code § 410(f); Mich. Code § 451.810(f); Minn. Code § 80A.23(9); Miss. Code § 75-71-727; Missouri Code § 409.4111(h); Montana Code § 30-10-307(4); Nebraska Code § 8-1118(5); Nevada Code § 90.840; New Hampshire Code § 421-B:25(IX); New Jersey Code § 49:3-71(h); New Mexico Code § 58-13B-55; North Carolina Code § 78A-56(h): North Dakota Code § 10-04-17 (voidable at purchaser's option); Ohio Code § 1707.43 (same); Oklahoma Code § 408(i); Pennsylvania Code § 508; Rhode Isl. Code § 7-11-802; South Carolina Code § 35-1-1540; South Dakota Code § 47-31A-410(h); Texas Code § 581-33(K); Utah Code § 61-1-22(8); Vermont Code § 4240(h); Washington Code § 21.20.430(5); West Virginia Code § 32-4-410(f); Wisconsin Code § 551.59(7); Wyoming Code § 17-4-122(f).

requirements. Cases have already been presented from the franchise, securities, financial and construction industries. Several states, including Alabama, have shown no compunction over invalidating arbitration agreements upon such grounds even though it is clear that they are not generally applicable contract defenses and even though it is clear that they do not put in issue the making of the arbitration agreement. Left unchecked, this trend will defeat the purposes of the FAA and this Court's many decisions on the subject.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ALABAMA RELEASED NOVEMBER 8, 2002

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2002-2003

1011189

Securities America, Inc.

v.

Charles P. Rogers et al.

Appeal from Jefferson Circuit Court
(CV-01-6514)

WOODALL, Justice.

Securities America, Inc. ("SAI"), a defendant in an action pending in the Jefferson Circuit Court, appeals from the trial court's order denying its motion to compel arbitration of the claims made against it by the plaintiffs. We affirm.

I.

SAI is a securities broker-dealer registered with the United States Securities and Exchange Commission and is a member of the National Association of Securities Dealers. SAI offers securities to the public through a nationwide network of registered representatives. SAI is registered under the laws of Alabama to offer and sell securities.

Appendix A

The 10 plaintiffs — Charles P. Rogers, Margaret Rogers, M. Khris McAlister, Robert F. McCullough, William S. Ringland, Adrian Ringland, Jr., Adrian Ringland III, Bertha Ringland, George Edwards, and John Taliaferro — allege that "[t]his is a case about the criminal actions of a con artist . . . who assumed his college roommate's identity and stole over $1 million from the ten individual plaintiffs." Brief of Appellees, at 4. That alleged "con artist" is Scott Wolas, who, using the name of Allen Lee Hengst, his college roommate, became a registered representative of SAI, opened a branch office in Orlando, Florida, and obtained an Alabama securities license under that assumed name.

The plaintiffs allege that acting "[o]n behalf of SAI and in violation of the Alabama Securities Act, Wolas (masquerading [as] Allen Hengst) enticed each of [them] into investing in securities approved and supported by SAI." Brief of Appellees, at 6. Further, they allege that they "lost substantial amounts of [money] as a result of the negligent, wanton and fraudulent acts of Wolas and SAI." Brief of Appellees, at 7.

SAI contends that "[p]laintiffs' claims stem solely from alleged losses arising from their dealings in bogus gold certificates with [Wolas, masquerading as Hengst], a registered representative of . . . SAI." Brief of Appellant, at 7. Further, SAI states that, "unbeknownst to [it], [Wolas, masquerading as Hengst,] had been operating a Ponzi scheme[1] selling 'gold certificates' prior to his affiliation with

1. "The term 'ponzi scheme' refers to an investment scheme whereby returns to investors are financed, not through the success (Cont'd)

. . . SAI and apparently continued to do so after he became registered with the firm." Brief of Appellees, at 9.

Five of the plaintiffs — M. Khris McAlister, Robert F. McCullough, Charles P. Rogers, Margaret Rogers, and William S. Ringland (the "nonsignatory plaintiffs") — never opened an account with SAI and, therefore, never signed any agreement with SAI. On the other hand, the other five plaintiffs — Adrian Ringland, Jr., Adrian Ringland III, Bertha Ringland, George Edwards, and John Taliaferro (the "signatory plaintiffs") — opened brokerage accounts with SAI, signing and receiving documents concerning those accounts. The documents were presented to the signatory plaintiffs by Wolas, who signed the documents as SAI's registered representative, using the name "Allen Hengst."

Each signatory plaintiff signed a new account application, which contains the following language directly above the client-signature line:

> "I HEREBY ACKNOWLEDGE THAT I AM IN RECEIPT AND HAVE READ, UNDERSTOOD AND AGREED TO THE TERMS SET FORTH IN THE SAI CLIENT AGREEMENT AND THAT THIS ACCOUNT IS GOVERNED BY A PRE-DISPUTE ARBITRATION AGREEMENT WHICH I HAVE READ AND UNDERSTAND."

(Cont'd)
of an underlying business venture, but from the principal sums of newly attracted investors. . . . Initial investors are actually paid the promised returns, attracting additional investors." *In re Primeline Sec. Corp.*, 295 F.3d 1100, 1104 n.2 (10th Cir. 2002).

Appendix A

(Capitalization in original.) Additionally, George Edwards and John Taliaferro opened retirement accounts with SAI, signing applications that contain the following language directly above the customer-signature line:

> "I REPRESENT THAT I HAVE READ THE CUSTOMER AGREEMENT GOVERNING THIS ACCOUNT AND AGREE TO BE BOUND BY SUCH CUSTOMER AGREEMENT AS CURRENTLY IN EFFECT AND AS MAY BE AMENDED FROM TIME TO TIME. THIS ACCOUNT IS GOVERNED BY A PRE-DISPUTE ARBITRATION AGREEMENT. . . . I ACKNOWLEDGE RECEIPT OF THE PRE-DISPUTE ARBITRATION AGREEMENT."

(Capitalization in original.)

All the signatory plaintiffs established their accounts as option accounts, which required them to execute option account agreements. Those agreements contain the following language directly above the customer-signature line:

> "I REPRESENT THAT I HAVE READ THE TERMS AND CONDITIONS GOVERNING THIS ACCOUNT AND AGREE TO BE BOUND BY SUCH TERMS AND CONDITIONS AS CURRENTLY IN EFFECT AND AS MAY BE AMENDED FROM TIME TO TIME. THIS ACCOUNT IS GOVERNED BY A PRE-DISPUTE ARBITRATION AGREEMENT

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> . . . . I ACKNOWLEDGE RECEIPT OF THE PRE-DISPUTE ARBITRATION AGREEMENT."

(Capitalization in original.)

The predispute arbitration agreement contained in the SAI customer agreement, which agreement is referenced in the separate agreements executed by all the signatory plaintiffs, provides in pertinent part:

> "I AGREE THAT ALL CONTROVERSIES THAT MAY ARISE BETWEEN US CONCERNING ANY ORDER OR TRANSACTION, OR THE CONTINUATION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN US, WHETHER ENTERED INTO BEFORE, ON, OR AFTER THE DATE THIS ACCOUNT IS OPENED, SHALL BE DETERMINED BY ARBITRATION BEFORE A PANEL OF INDEPENDENT ARBITRATORS SET UP BY EITHER THE NEW YORK STOCK EXCHANGE, INC., OR NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS I MAY DESIGNATE."

(Capitalization in original.)

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II.

On October 19, 2001, the plaintiffs sued SAI and Wolas, alleging that the "action arises out of [their] financial investments . . . made through SAI's agent, principal and employee — the so-called 'Allen Lee Hengst' — the most recent alias of Scott J. McKay Wolas." Seeking both compensatory and punitive damages, the complaint asserted claims of fraudulent misrepresentation and deceit; fraudulent suppression and concealment; negligent or wanton hiring, training, and supervision; breach of fiduciary duty; violation of § 8-6-17, Ala. Code 1975; and violation of §§ 8-6-3 and -4, Ala. Code 1975.

On December 13, 2001, SAI answered the complaint. It asserted as a defense that "[p]laintiffs' claims are subject to mandatory arbitration agreements." On that same date, SAI filed a motion to dismiss, or, alternatively, to stay the proceedings and compel arbitration. SAI attached to that motion the affidavit of Kevin Zemann, its director of regional supervision, to which were attached copies of those documents signed and/or received by the signatory plaintiffs.

On December 19, 2001, SAI filed a brief in support of its motion to compel arbitration. The brief was accompanied by the affidavit of Lamar S. Jones, SAI's vice president and chief operations officer. That affidavit described the interstate nature of SATs business, as well as aspects of a sale-of-securities transaction.

On January 30, 2002, the plaintiffs filed a brief in opposition to SAI's motion to compel arbitration. On February 1, 2002, the trial court denied SAI's motion. SAI appealed.

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III.

This Court recently reiterated the standard of review of a denial of a motion to compel arbitration:

> "'This Court reviews the denial of a motion to compel arbitration de novo. *Green Tree Fin. Corp. v. Vintson*, 753 So. 2d 497, 502 (Ala. 1999); *Patrick Home Ctr., Inc. v. Karr*, 730 So. 2d 1171, 1172 (Ala. 1999). The party seeking to compel arbitration has the initial burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction substantially affecting interstate commerce. *TranSouth Fin. Corp. v. Bell*, 739 So. 2d 1110, 1114 (Ala. 1999); *Sisters of the Visitation v. Cochran*, 775 So. 2d 759 (Ala. 2000). "[A]fter a motion to compel arbitration has been made and supported, the burden is on the nonmovant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question." *Jim Burke Auto., Inc. v. Beavers*, 674 So. 2d 1260, 1265 n.1 (opinion on application for rehearing) (Ala. 1995).'"

SouthTrust Bank v. Ford, [Ms. 1010124, May 17, 2002] __ So. 2d __, __ (Ala. 2002) (quoting *American Gen. Fin., Inc. v. Morton*, 812 So. 2d 282, 284 (Ala. 2001)).

As previously discussed, the signatory plaintiffs had entered into written agreements with SAI, while the nonsignatory plaintiffs had not. Therefore, the controlling principles must be applied separately to each group of plaintiffs.

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IV.

The trial court refused to compel the nonsignatory plaintiffs to arbitrate their claims against SAI. On appeal, SAI argues that although "[t]he non-signatory plaintiffs are complete strangers to [it]," they "should be required to arbitrate their claims just like any other SAI 'customer.'" Brief of Appellant, at 30. SAI's argument has no merit.

SAI, as the party seeking to compel arbitration, had the initial burden of proving the existence of a contract calling for arbitration of the claims of the nonsignatory plaintiffs. That threshold burden is imposed upon the party seeking to compel arbitration because "'"a party cannot be required to submit to arbitration any dispute he has not agreed to submit."'" *Cook's Pest Control, Inc. v. Boykin*, 807 So. 2d 524, 526 (Ala. 2001) (quoting *Old Republic Ins. Co. v. Lanier*, 644 So. 2d 1258, 1260 (Ala. 1994), quoting in turn *A.G. Edwards & Sons, Inc. v. Clark*, 558 So. 2d 358, 362 (Ala. 1990)). SAI provided no evidence of any contract by which any nonsignatory plaintiff agreed to submit any dispute to arbitration.

SAI argues that the nonsignatory plaintiffs should be compelled to arbitrate their disputes, because, SAI alleges, "the non-signatory plaintiffs are attempting to avail themselves of the benefits of [the SAI customer agreement]." Brief of Appellant, at 31. The nonsignatory plaintiffs respond that their claims are not based upon SAI's customer agreement and that they "do not allege breach of contract." Brief of Appellees, at 27. Our review of the complaint indicates that the plaintiffs are not attempting "to enforce

selectively the provisions of . . . SAI's customer agreement," as alleged by SAI. Brief of Appellant, at 31. Without addressing the legal merits, if any, of SAI's argument, we conclude that the argument must fail, because of a total absence of factual support.

The trial court did not err in refusing to compel the arbitration of the claims of the nonsignatory plaintiffs. Therefore, to that extent, its order denying SAI's motion to compel arbitration must be affirmed.

V.

When SAI moved to compel arbitration of their claims, the signatory plaintiffs did not dispute the existence of contracts calling for arbitration, which contracts evidence transactions substantially affecting interstate commerce. Therefore, the burden shifted to the signatory plaintiffs to present evidence indicating that the arbitration agreements are not valid or that they do not apply to the disputes in question. While the signatory plaintiffs did not dispute the applicability of the agreements, they did contend that the agreements are not valid or enforceable.

In *Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 315 (Ala. 2000), "[t]he ultimate issue . . . [was] whether the trial court, or an arbitrator, determines the validity of a contract that contains a provision requiring that all claims arising therefrom be arbitrated." (Footnote omitted.) This Court held that "the trial court, as opposed to the arbitrator, must decide the ultimate question relating to the legality and enforceability of the contracts." 794 So. 2d

at 317. Thus, it was appropriate for the trial court, as it is for this Court, to address the enforceability by SAI of the SAI customer agreements.

The parties agree that SAI and its registered representatives are subject to the Alabama Securities Act, codified at § 8-6-1 *et seq.*, Ala. Code 1975 ("the Act"). The purpose of the Act is to protect the public from fraudulent, dishonest, or unethical practices in the securities business. See Comment to § 8-6-3, Ala. Code 1975. "Statutes intended for the public benefit are to be construed most favorably to the public. *Gant v. Warr*, 286 Ala. 387, 240 So. 2d 353 (1970)." *St. Paul Fire & Marine Ins. Co. v. Elliott*, 545 So. 2d 760, 762 (Ala. 1989).

The Act requires that every person engaged in the business of effecting transactions in securities in Alabama be registered with the Alabama Securities Commission ("the Commission"). See, generally, § 8-6-3. Specifically, § 8-6-3(a) provides: "It is unlawful for any person to transact business in this state as a dealer or agent for securities unless he is registered under this article. It is unlawful for any dealer or issuer to employ an agent unless the agent is registered."[2] There is no evidence indicating that Scott Wolas was registered to sell securities in Alabama. Instead, it is undisputed that, because of Wolas's dishonesty, the Commission registered Allen Hengst, who had no knowledge that Wolas had assumed his identity for that purpose. Therefore, we must conclude that Wolas and SAI violated § 8-6-3(a).

---

2. The Act defines "agent" as "[a]ny individual other than a dealer who represents a dealer or issuer in effecting or attempting to effect sales of securities. . . ." § 8-6-2(2), Ala. Code 1975.

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The signatory plaintiffs argue that the SAI customer agreements containing the arbitration provision cannot be enforced, because, they argue, the Act "prohibits enforcement of contracts made in violation of its provisions." Brief of Appellees, at 9. SAI responds that the Act "offers no impediment to the enforcement of the arbitration agreements," because "SAI did not know that [Wolas, masquerading as Hengst,] was anyone other than who he purported to be." Reply Brief of Appellant, at 5. Our analysis of § 8-6-19(g), Ala. Code 1975, resolves this issue in favor of the signatory plaintiffs.

Section 8-6-19(g) provides, in pertinent part:

> "(g) No person who has made or engaged in the performance of any contract in violation of any provision of this article . . . *or* who has acquired any purported right under such contract *with knowledge of the facts by reason of which its making or performance was in violation*, may base any action on the contract."

(Emphasis added.)

As previously stated, we must construe this statute most favorably to the public, including the signatory plaintiffs. Therefore, we read it as stating, in relevant part, that "no person who has made or engaged in the performance of any contract in violation of any provision of the Act may base any action on the contract." Therefore, SAI is not entitled to enforce the arbitration provision in its customer agreements.

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As previously discussed, SAI contends that it is entitled to enforce the arbitration agreements because it had no knowledge of any violation of the Act. SAI's argument is based on the knowledge requirement in § 8-6-19(g), emphasized in our quotation of that provision. SAI would have us construe the statute to mean, in relevant part, that "no person who has made or engaged in the performance of any contract in violation of any provision of the Act, with knowledge of the facts by reason of which its making or performance was in violation, may base any action on the contract." However, not only does such a construction fail to construe the statute in favor of the public, it also fails to consider another relevant rule of statutory construction.

In *White v. Knight*, 424 So. 2d 566, 567-68 (Ala. 1982), this Court discussed the "doctrine of last antecedent":

> "[P]laintiff argues that the language [of the Code section] is ambiguous, and being so dictates the use of the 'doctrine of last antecedent' in discovering its meaning:
>
> > "'By what is known as the doctrine of the "last antecedent," relative and qualifying words, phrases, and clauses, are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote; . . . '

citing 82 C.J.S. *Statutes* § 334 (1953).

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> "We appreciate the application of this general rule of statutory construction; however, we also note from the cited section that the doctrine is only an aid to construction and 'will not be adhered to where extension to a more remote antecedent is clearly required by a consideration of the entire act. . . . Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all.' *Ibid.* See also 2A Sutherland Statutory Construction 47.33 (Sands 4th ed. 1973)."

The antecedent immediately preceding the phrase containing the knowledge requirement is a "person . . . who has acquired any purported right under any . . . contract [in violation of any provision of the Act]." Construing the statute in favor of the public, we see no reason to apply the knowledge requirement to the more remote antecedent, that is, to a "person who has made or engaged in the performance of any contract in violation of any provision of [the Act]."

The violations of the Alabama Securities Act rendered the SAI customer agreements unenforceable by SAI. Therefore, SAI is not entitled to seek arbitration under the provisions of those agreements, and the trial court did not err in denying SAI's motion to compel the signatory plaintiffs to arbitrate their claims.

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VI.

For the reasons stated above, the order of the trial court is affirmed.

AFFIRMED.

Houston, Lyons, Brown, Johnstone, and Stuart, JJ., concur.

Moore, C.J., concurs in the result.

Harwood, J., recuses himself.

APPENDIX B — CASE ACTION SUMMARY CONTINUATION

ALABAMA JUDICIAL DATA CENTER
CASE ACTION SUMMARY CONTINUATION
CIRCUIT CIVIL

IN THE CIRCUIT COURT OF JEFFERSON COUNTY

JUDGE: JACK D. CARL

FILED: 10/19/2001
TYPE: FRAUD
TYPE TRIAL: JURY

CHARLES P ROGERS ET AL

VS

SECURITIES AMERICA INC ET AL

DATE 1:	CA:	CA DATE:
DATE 2:	AMT:	$.00 PAYMENT

* * *

2/1/02 . . . Defendant Securities America, Inc.'s Motion To Dismiss . . . etc . . . filed 12/13/01 is DENIED

s/ Jack D. Carl

APPENDIX C — ORDER OF THE SUPREME COURT OF ALABAMA OVERRULING APPLICATION FOR REHEARING DATED FEBRUARY 7, 2003

IN THE SUPREME COURT OF ALABAMA

February 7, 2003

1011189

Securities America, Inc.

v.

Charles P. Rogers et al.

(Appeal from Jefferson Circuit Court: CV-01-6514)

ORDER

IT IS ORDERED that the application for rehearing filed in this cause is overruled.

Application for Rehearing Overruled – No Opinion

WOODALL, J. – Moore, C.J., and Houston, Lyons, Brown, Johnstone, and Stuart, JJ., concur; Harwood, J., recuses.

APPENDIX D — RELEVANT STATUTES

Federal Statutory Provisions

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

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Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default,

or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Alabama Statutory Provisions

Section 8-6-3 Registration and bonds of dealers and salesmen. (Excerpt)

(a) It is unlawful for any person to transact business in this state as a dealer or agent for securities unless he is registered under this article. It is unlawful for any dealer or issuer to employ an agent unless the agent is registered.

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(b) It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless:

(1) He is so registered under this article;

Section 8-6-19 Civil liabilities of sellers, agents, etc.; remedies of purchasers. (Excerpts)

(g) No person who has made or engaged in the performance of any contract in violation of any provision of this article or any rule or order hereunder or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any action on the contract.

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1724

IN THE

Supreme Court of the United States

SECURITIES AMERICA, INC.,
Petitioner,

v.

CHARLES P. ROGERS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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June 27, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, allows a court to decide that an arbitration clause, which was incorporated into a securities customer application form that was illegally executed with a forged signature, is not enforceable.

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OPINIONS BELOW

The slip opinion of the Supreme Court of Alabama, Pet. App. 1a-14a, is not yet published, and the order of the Circuit Court of Jefferson County, Pet. App. 15a, is unpublished.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered November 8, 2002. A motion for re-hearing was denied on February 7, 2003. Pet. App. 16a. Justice Kennedy, as Circuit Justice, granted a 15-day extension of time to the Petitioner to file its petition. The Petitioner filed its petition on May 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Each customer application form upon which Petitioner relies in seeking arbitration in this case bears, on the one hand, the true and legal signature of a Respondent and, on the other hand, the false and illegal signature of "Allen Hengst"—a signature forged by Scott Wolas.[1] Scott Wolas is a fugitive from justice who fled New York in the mid-1990s after allegedly engaging in investment fraud. He is currently under indictment.

Wolas surfaced in Florida assuming the identity of Allen Hengst, a librarian in the District of Columbia with whom he had roomed in college.[2] Petitioner Securities America, Inc.

---

[1] The forged signature of "Allen Hengst" is on each and every customer application form signed by the Respondents. Pet. App. 3a (C 67-107 of the record on appeal). The Respondents' Appendix includes, as a representative sample, the New Account Application signed by Respondent George Edwards and by Wolas, who forged the signature of "Allen Hengst." Resp. App. 1a.

[2] The "real" Allen Hengst lost touch with Wolas after they left college. After years apart, Wolas contacted Hengst in 1996 asking for a place to stay. Hengst allowed Wolas to live with him in Washington, D.C. for

("SAI"), a securities broker-dealer, hired Wolas, who used the alias "Allen Hengst," as a securities salesman in Florida.

Wolas subsequently registered with the Alabama Securities Commission under the false name "Allen Hengst." Masquerading as SAI salesman Hengst, Wolas solicited investments in fake gold certificates, among other things, from ten individual investors (the "Investors") who resided in Alabama.[3] He signed SAI's standard customer application forms with five of the Investors, forging the name "Allen Hengst."[4] The application forms incorporated an arbitration clause. Sometime during December 2000 or January 2001, Wolas absconded with the Investors' money and currently remains a fugitive from justice.

When SAI refused to make the Investors whole, they filed suit against SAI, claiming losses aggregating over $1 million. The Investors asserted claims of fraudulent misrepresentation; fraudulent suppression; negligent or wanton hiring, training,

---

approximately four months. At that time, Wolas was wanted by New York authorities in connection with securities fraud that he allegedly committed as an attorney in New York. Wolas left Washington, D.C. in June 1996. Shortly thereafter, Wolas assumed Hengst's identity. The real Allen Hengst remains a librarian in Washington, D.C.

[3] Khris McAlister, Robert McCullough, Charles Rogers, Margaret Rogers, William Ringland, Adrian Ringland, Jr., Adrian Ringland, III, Bertha Ringland, George Edwards, and John Taliaferro invested in these fake gold certificates. Before this Court, Petitioner SAI only challenges the arbitrability of the claims of Adrian Ringland, Jr., Adrian Ringland, III, Bertha Ringland, George Edwards, and John Taliaferro, the only Investors who signed customer application forms.

[4] Though Wolas has not yet formally been charged with the crime of "forgery" under Alabama Code § 13A-9-3, Respondents use the term in its common sense: "A signature of a person that is made without the person's consent and without the person otherwise authorizing it." BLACK'S LAW DICTIONARY 650 (6th ed. 1990). It is undisputed that Wolas signed Hengst's name without Hengst's consent.

and supervision; breaches of fiduciary duties owed to the Investors; and for violations of the Alabama Securities Act arising out of the investments Wolas sold on behalf of SAI.

SAI moved to compel arbitration, but did not dispute that Wolas had registered under the false name "Allen Hengst" with the Alabama Securities Commission or that he had falsely signed the name "Allen Hengst" on the customer application forms that he had executed with the five Investors. The Investors opposed this motion. The trial court denied the motion to compel arbitration. The Supreme Court of Alabama affirmed.

REASONS FOR DENYING THE WRIT

"'[A]rbitration is a matter of contract . . . .'" *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).[5] A contract must be formed by the legally valid assent of at least two parties. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 9 & 12 (1981). "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative . . . ." 10 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1139A at 398 (3rd ed. 1967). Because Wolas

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[5] The Federal Arbitration Act provides:

> A *written provision in* any maritime transaction or *a contract* evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphases added).

forged the signature "Allen Hengst" on every customer application document, there was no legally valid assent and thus no contract that could have incorporated the arbitration clause. The Investors' claims are for the courts to decide.

I. BECAUSE THE ARGUMENT AND THE DECISION ON THE MERITS BELOW IN THIS FACT-BOUND CASE ADDRESSED THE MAKING OF THE CONTRACTS, *FIRST OPTIONS*, NOT *PRIMA PAINT*, CONTROLS.

As a preliminary matter, it is necessary to clarify the arguments made below in order to frame the question presented by this case. The parties disagree as to whether this case deals with the enforceability of a contract after it was validly made or with a challenge to both the formation of a contract and its enforceability. Petitioner argues that the Investors conceded that legal contracts were validly made and existed, and only challenged the enforceability of the contracts due to a lack of compliance with the Alabama Securities Act. Pet. 10. Thus, Petitioner contends that *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), which required arbitration of a fraudulent inducement challenge to a contract that was admittedly assented to by both parties, governs this case. Respondents contend, and the record demonstrates, that while they admitted the physical existence of the contract forms and their signatures on them, they consistently challenged both the making of the contracts—their legal existence—and their enforceability if they were found to have been validly made. Thus, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which governs the arbitrability of challenges to the formation, or legal existence, of a contract, governs this case.

Specifically, Petitioner contends:

> The Signatory Plaintiffs resisted arbitration, but in doing so conceded three important points: (1) *the*

> *existence of and their assent to the arbitration agreements*; (2) that the transactions in question substantially affected interstate commerce; and (3) that the arbitration agreements applied to their claims. Pet. App. 9a. The grounds of Plaintiffs' resistance to arbitration did not go to the making of the agreement to arbitrate. Instead, they contended that the underlying New Account Agreements were unenforceable under ALA. CODE § 8-6-19 (g) because Scott Wolas was not registered under the Alabama Securities Act in that name. The unenforceability of their application agreements, they contended, also made the arbitration provisions within them unenforceable.

Pet. 10 (emphasis added).

In a footnote, the Petitioner further asserts:

> These concessions make it "clear and unmistakable" that the parties agreed to arbitrate the Plaintiffs' challenge to the legality of the underlying agreements with SAI. The question of arbitrability is therefore not for judicial determination. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) . . . .

Pet. 10 n.2.

It is certainly true that the Investors did not dispute the *physical* existence of the form "contracts"—the customer application forms—and did not dispute that they affixed their true and legal signatures to those forms. However, the Investors did dispute, and thus did not "concede," the *legal* existence of valid and binding contracts based on SAI's and Wolas's illegal acts, including the forging on each and every customer application form of the signature "Allen Hengst," the criminal alias of the fugitive Wolas. *See, e.g.*, Resp. App. 1a.

Before the trial court, the Investors did not assert a claim for breach of contract or seek rescission of a contract because it was their position and the clear law that no contract had been made. Further, the Investors argued:

> Wolas, *using the alias "Allen Hengst," signed the agreements* on behalf of SAI as its "registered representative."
>
> . . . .
>
> If an individual uses a false or assumed name to secure a license to transact any business in this state as a dealer or agent for securities or as an investment advisor, that individual has violated ALA. CODE § 8-6-3 (d) and is *not properly licensed under Alabama law to transact any business* as a dealer or agent for securities or as an investment advisor. *See* ALA. CODE § 8-6-3 (j) (1).

(C. 167, 169-70) (emphases added).

On pages 19 and 20 of their brief to the Supreme Court of Alabama, the Investors further argued:

> *The trial court, and not the arbitrator, decides the ultimate question of the legality and enforceability of the contract. Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 317 (Ala. 2000). As this Court in *Harris* stated:
>
> > "[W]e have adopted the reasoning that 'a party who contests the *making of a contract* containing an arbitration provision can not be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate,' and that '[o]nly a court can make that decision.'"
>
> *Id.*; *quoting NationsBanc Invs., Inc. v. Paramore*, 736 So. 2d 589, 593 (Ala. 1999), (*quoting Shearson Lehman*

Bros., Inc. v. Crisp, 646 So. 2d 613, 616-17 (Ala. 1994) (emphasis in *Shearson Lehman Bros.*)).

(Emphases added).[6] Accordingly, the issue of the making of the contracts was raised. *See Eddings v. Oklahoma,* 455 U.S. 104, 113-14 n.9 (1982); *Picard v. Connor,* 404 U.S. 270, 278 (1971).

The Supreme Court of Alabama's opinion thus states:

> The signatory plaintiffs argue that the SAI customer agreements containing the arbitration provision cannot be enforced, because, they argue, the Act "prohibits enforcement of *contracts made* in violation of its provisions." Brief of Appellees, at 9. SAI responds that the Act "offers no impediment to the enforcement of the arbitration agreements," because "SAI did not know that [Wolas, masquerading as Hengst,] was anyone other than who he purported to be.
>
> . . . .
>
> Section 8-6-19 (g) provides, in pertinent part:
>
> > "(g) No person who has made or engaged in the performance of any contract in violation of any provision of this article . . . *or* who has acquired any purported right under such contract *with knowledge of the facts by reason of which its making or performance was in violation*, may base any action on the contract."

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[6] On page 9 of their Brief in Opposition to Rehearing before the Supreme Court of Alabama, the Investors argued:

> The contracts are void and unenforceable because the contracts as a whole violate Alabama law. Stated differently to satisfy SAI, *the contracts never existed because they were entered into in violation of Alabama law. See Harris*, 794 So. 2d at 316 (finding that a challenge to the legality of the contract is a challenge to the contract's existence).

(Emphasis added).

. . . .

> Therefore, we read it as stating, in relevant part, that "no person who has *made* or engaged in the performance of *any contract in violation* of any provision of the Act may base any action on the contract." Therefore, SAI is not entitled to enforce the arbitration provision in its customer agreements.

Pet. App. 11a (first, second, fifth, and sixth emphases added).

Thus, this case was argued and decided on the merits based on challenges to the legality of both the making and the performance of the purported contracts.[7] Because the making—formation—of the purported contracts, which incorporated the arbitration clause, is at issue, *First Options,* and not *Prima Paint,* controls.

This simply is not a case in which a securities brokerage company's salesman, acting in good faith, technically failed to comply with a state securities law, signed a customer application form containing an arbitration clause, and had the customer assert the technical violation to avoid arbitration of

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[7] The basis of the Supreme Court of Alabama's decision is somewhat unclear. For the Investors who did not sign the customer application forms, the court held that they could "not be required to submit to arbitration any dispute [they] ha[ve] not agreed to submit." Pet. App. 8a (internal quotations and citations omitted). For the Investors who did sign the customer application forms, the court stated that while they "did not dispute the existence of contracts calling for arbitration, . . . they did contend that the agreements are not valid and enforceable." Pet. App. 9a. A contract may not be "valid," of course, both because it was never made and because it cannot be performed. The peculiar history of this case involves Wolas's use of a forged signature to make the purported contracts, the Investors' repeated challenges to the "making" of the contracts, and the court's basing of its decision on a statute that invalidates "any contract" "made" in violation of the securities laws. Thus, the Alabama Supreme Court's decision cannot be regarded as based solely and completely on the erroneous assumption that the Investors "conceded" that the underlying contracts were validly and legally made.

a claim. Instead, this is a case in which a securities brokerage company hired a fugitive from justice who, acting in bad faith, purposely violated state securities law, forged a signature on customer application forms containing an arbitration clause, and had the customers assert the purposeful violation and the false signature to avoid arbitration of their claims. Accordingly, this case involves the questions whether and how a court should decide a challenge to arbitration involving the making, or formation, of the "contract" incorporating the arbitration clause. This Court answered these questions in *First Options*.

II. THE DECISION OF THE SUPREME COURT OF ALABAMA DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, THOSE FEDERAL CIRCUIT COURTS OF APPEAL THAT ADDRESS FAILURE TO ASSENT TO A CONTRACT CONTAINING AN ARBITRATION CLAUSE, OR THE STATE COURTS OF LAST RESORT.

A. The Decision of the Supreme Court of Alabama Does Not Conflict With the Decisions of This Court.

In *First Options*, 514 U.S. at 943, this Court stated:

> [T]he question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. . . . If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to

> arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.

This Court then addressed how a court should decide an issue of arbitrability:

> *When deciding whether the parties agreed to arbitrate a certain matter* (including arbitrability), *courts* generally (though with a qualification we discuss below) *should apply ordinary state-law principles that govern the formation of contracts. . . .*
>
> This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: *Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.*

First Options, 514 U.S. at 944 (fourth, fifth, sixth, and seventh emphases added).

Petitioner cannot point to the arbitration provision in this case for "'clear and unmistakable' evidence" that the parties agreed to arbitrate the issue whether there were ever legal and binding contracts between the parties such that the arbitration clause would be applicable to the Investors' claims against SAI. The arbitration clause relied on by SAI simply provides for the arbitration of "all controversies" that concern "any order or transaction, or the continuation, performance, or breach" of the customer agreement or any other agree-

ment.[8] It does not provide for the arbitration of matters that concern the making or formation of the contract in the first place. *See, e.g., Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1012 (11th Cir. 1998) (holding that district court correctly decided issue of arbitrability when "[t]he agreement in this case does not contain any language specifically authorizing the arbitration panel to decide arbitrability issues..."), *cert. denied*, 525 U.S. 1068 (1999); *McLaughlin v. Terminix Int'l Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (holding that the district court correctly determined the issue of arbitrability because "neither the arbitration clause nor any other provision in the 1984 contract between [the parties] clearly and unmistakenly evidenced the parties' intent to give the arbitrator power to determine arbitrability"); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir. 1995) (holding that arbitrability is determined by the trial court when "nothing in the agreement between [the parties] clearly stat[ed] that the question of arbitrability of judgments should be decided by an arbitrator"); *cf.*

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[8] The arbitration clause that was incorporated into the customer application forms simply provides:

> I AGREE THAT ALL CONTROVERSIES THAT MAY ARISE BETWEEN US CONCERNING ANY ORDER OR TRANSACTION, OR THE CONTINUATION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN US, WHETHER ENTERED INTO BEFORE, ON, OR AFTER THE DATE THIS ACCOUNT IS OPENED, SHALL BE DETERMINED BY ARBITRATION BEFORE A PANEL OF INDEPENDENT ARBITRATORS SET UP BY EITHER THE NEW YORK STOCK EXCHANGE, INC., OR NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS I MAY DESIGNATE.

Because SAI drafted this arbitration clause, any ambiguity in the clause must be construed against SAI. *See, e.g., United States v. Seckinger*, 397 U.S. 203, 210 (1970); *Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 661-62 (Ala. 2001); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

Jim Burke Automotive, Inc. v. McGrue, 826 So. 2d 122, 132 (Ala. 2002) (holding that an arbitrator determines the issue of arbitrability when the arbitration clause specifically states that "the interpretation and scope of this clause and the arbitrability of any issue" was to be arbitrated). Consistent with this Court's decision in *First Options*, the Supreme Court of Alabama decided that the courts, and not an arbitrator, should decide whether the customer application forms that incorporated the arbitration clause were legally and validly made such that they could bind the parties.[9] Pet. App. 9a-10a.

In deciding whether the parties made legal and valid contracts by assenting to the customer application forms, the Supreme Court of Alabama was charged with applying "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944.

The peculiar facts of this case, including Wolas registering under the alias "Allen Hengst" and forging that alias on the customer application forms, result in no contract being formed under Alabama law generally applicable to the

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[9] In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 592 (2002), this Court confirmed:

> [A] gateway dispute about whether the parties are bound by a given arbitration clause raises a "question of arbitrability" for a court to decide. See [*First Options*, 514 U.S.], at 943-946, 115 S. Ct. 1920 (holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement). . . . Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court. . . .
>
> "'[P]rocedural' questions which grow out of the dispute and bear on its final disposition" are presumptively not for the judge, but for an arbitrator, to decide. . . . So, too, the presumption is that the arbitrator should decide "allegation[s] of wavier, delay, or a like defense to arbitrability."

formation of securities contracts or other contracts. The Alabama Securities Act provides, in pertinent part:

> It is unlawful for any person *to transact business* in this state as a dealer or agent for securities unless he is registered under this article. It is unlawful for any dealer or issuer to employ an agent unless the agent is registered.

ALA. CODE § 8-6-3 (a) (2002) (emphasis added). And the Act further provides:

> (g) No person who has *made* or engaged in the performance of any *contract in violation* of any provision *of this article* . . . or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any action on the contract.

ALA. CODE § 8-6-19 (g) (2002) (emphases added).

Wolas "transact[ed] business" in Alabama beginning, at least, when he "made" the "contract[s]" by forging the signature of his criminal alias on each customer application form and ending when he absconded with the money that he had stolen from the Investors. As the Supreme Court of Alabama stated:

> [I]t is undisputed that, because of Wolas's dishonesty, the Commission registered Allen Hengst, who had no knowledge that Wolas had assumed his identity for that purpose. Therefore, we must conclude that Wolas and SAI violated § 8-6-3 (a).[10]

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[10] The Supreme Court of Alabama's interpretation of the Alabama Securities Act clearly applies to any contract made in violation of the securities law, not solely to arbitration clauses. Thus, the decision does not implicate the principle that the Federal Arbitration Act ("FAA") preempts any state law that specifically targets an arbitration clause for detrimental treatment. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.");

Similarly, under general Alabama contract law, a contract with a forged signature cannot be enforced. *See Ex parte Steadman*, 812 So. 2d 290, 293 (Ala. 2001) ("The requisite elements of [a contract] include: an offer and an acceptance, consideration, and *mutual assent* to terms essential to the formation of a contract.") (internal quotations omitted) (emphasis added); *see generally Conseco Finance Corp. of Alabama v. Slay*, 839 So. 2d 617, 618 (Ala. 2002) (noting with approval that a party conceded "that the trial court properly held that the question whether the signature on the contract purporting to be [plaintiff's] was forged was a question for a jury"); *Duckworth v. National Bank of Commerce*, 656 So. 2d 340, 344 (Ala. 1994) (noting the trial court's finding that a bank vice-president's forged signature on a contract imposed no binding obligation).[11]

Thus, unlike the contract in *Prima Paint*, 388 U.S. at 397-98, that was admittedly assented to by both parties and was later attacked on the grounds that fraud induced the assent of one of the parties, the customer application forms in this case were never validly assented to by both parties because the

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cf. id. at 688-89 (holding that the FAA pre-empted a Montana statute that, as interpreted by the state supreme court, specifically targeted arbitration clauses by conditioning their enforcement on compliance with special notice requirements); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16 (1984) (holding that the FAA pre-empted a California statute that, as interpreted by the state supreme court, specifically targeted arbitration clauses by barring any waiver of a judicial trial).

[11] Moreover, because SAI and Wolas were not properly and legally registered to transact business in Alabama, no post-signing conduct of the parties could ratify or create any contract. *See* ALA. CODE §§ 8-6-3 (a) & 19(g) (2002); 10 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1139A at 398-99 (3rd ed. 1967) ("When a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative ... It is pointed out that, since the forgery did not purport to be made on behalf of the person whose name was forged, there can be no ratification.")

signature of one party was a forgery, and the Investors did not assert fraudulent inducement. Based on the peculiar facts of this case, the Supreme Court of Alabama's decision is consistent with this Court's unanimous decision in *First Options*, 514 U.S. at 943-44.

B. The Decision of the Supreme Court of Alabama Does Not Conflict with Those Decisions of the Federal Circuit Courts of Appeal that Address Failure to Assent to a Contract Containing an Arbitration Clause.

Petitioner attempts to construct a conflict between the decision of the Supreme Court of Alabama and the decisions of the federal circuit courts of appeal regarding the applicability of *Prima Paint*'s severability doctrine under which an arbitrator decides questions of fraudulent inducement of a contract containing an arbitration clause, unless the fraudulent inducement specifically relates to the arbitration clause itself. *Prima Paint,* 388 U.S. at 403-04. While there is some disagreement among the federal circuit courts of appeal themselves over contracts that have been assented to, but are subject to a defense, there is no conflict with the peculiar facts of this case where Wolas's forged signature and other violations of Alabama law prevented a valid, binding contract from being made in the first place.

Several circuit courts have held that if an agreement is attacked as void, as opposed to voidable, the court decides whether the parties' claims are subject to arbitration. In *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991), the Ninth Circuit held that *Prima Paint*'s severability rule required the arbitrator to decide claims of rescission of a contract made where, for example, the party opposing arbitration asserts fraud in the inducement, frustration of purpose, mutual mistake, or the minority status of a party as a defense to the entire contract.

Id. at 1140. However, the Ninth Circuit held that such rationale did not extend to claims that the underlying contract was void as having never been made where, for example, the party opposing arbitration asserts the lack of an agent's authority, signature on the wrong document, or failure to validly sign a document. *Id.* at 1141. The Ninth Circuit explained:

> [W]e read *Prima Paint* as limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to. A contrary rule would lead to untenable results. Party A could *forge* party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature. Similarly, any citizen of Los Angeles could sign a contract on behalf of the city and Los Angeles would be required to submit to an arbitrator the question whether it was bound to the contract, even if its charter prevented it from engaging in *any* arbitration.

Id. at 1140 (third emphasis added).

The Second Circuit, which this Court affirmed in *Prima Paint*, has also recognized that a court, and not an arbitrator, decides questions of arbitrability that attack the entire contract as void, such as a claim that the agent who signed a contract lacked authority to do so. *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26 (2nd Cir. 2001); *accord Spahr v. Secco*, Nos. 00-1132, 00-1152, 2003 WL 212267775 (10th Cir. June 3, 2003) (holding that claim that an investment account contract was void for lack of mental capacity of one of the parties was for the court to decide); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3rd Cir. 2000) (holding that claim that purchase contract was void because agent lacked authority to enter into it was for the court to decide).

Some circuit courts, however, have held that if an agreement, to which both parties have assented, is attacked as void,

the arbitrator should decide. For example, the Eleventh Circuit has held that a challenge to a contract, to which the parties had assented, as being void *ab initio* for including a usurious interest rate was for the arbitrator to decide. *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002); *see generally Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (holding that claim that a contract, to which parties had assented, was void *ab initio* because it contained a usurious interest rate term was for the arbitrator to decide); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) (holding that claim that a securities account contract, to which the parties had assented, was void because one of the parties lacked mental capacity was for the arbitrator to decide); *Burden v. Check into Cash of Kentucky, L.L.C.*, 267 F.3d 483 (6th Cir. 2001) (holding that claim that contract, to which parties had assented, was void because it contained a usurious interest rate was for the arbitrator to decide); *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000) (holding that claim that a hedge contract, to which parties had assented, was illegal because one party had failed to comply with commodities regulations was for the arbitrator to decide); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress, Int'l*, 1 F.3d 639 (7th Cir. 1993) (holding that claim that a franchise contract, to which parties had assented, should be rescinded was for arbitrator to decide); *Lawrence v. Comprehensive Bus. Svcs. Co.*, 833 F. 2d 1159 (5th Cir. 1987) (holding that claim that a contract, to which parties had assented, was void under the Texas Public Accountancy statute was for the arbitrator to decide); *Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co.*, 774 F.2d 524 (1st Cir. 1985) (holding that claim that a reinsurance contract, to which parties had assented, should be rescinded for frustration of purpose was for the arbitrator to decide).

None of the cases cited by Petitioner as requiring the arbitrator to decide issues of arbitrability, however, addresses facts in which one of the parties to the contract never assented

to, or signed, the contract or assented via an admittedly forged signature. As Judge Easterbrook stated for the Seventh Circuit in *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001):

> Many appellate courts have held that the judiciary rather than an arbitrator decides whether a contract came into being. See, e.g., *Sandvik AB v. Advent International Corp.* 220 F.3d 99, 105-09 (3d Cir. 2000); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 729 (8th Cir. 1976); *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925, F.2d 1136, 1139-42 (9th Cir. 1991); *Chastain* [*v. Robinson Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992)]. Most of these decisions involve the same question as our case: whether a dispute about an agent's authority to bind the principal to the contract is arbitrable. *Every appellate court that has addressed this question has answered "no*, unless . . .". The "unless" clause reflects the fact that parties may agree separately to arbitrate disputes about whether they have agreed to the contract's substantive promises. See *First Options*, 514 U.S. at 943, 115 S. Ct. 1920.

(Emphasis added.) Indeed, in *Chastain v. Robinson Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992), cited by Judge Easterbrook, the Eleventh Circuit refused to enforce an arbitration agreement where a party claimed that her signature had been "forged."

In this case, Wolas, the fugitive from justice, forged the signature "Allen Hengst" on the customer application forms; thus there was no valid assent and no contract. The Supreme Court of Alabama held that a court should decide whether the Investors' underlying claims are subject to arbitration. On the particular facts of this case, no circuit court of appeal disagrees with that decision.

C. The Decision of the Supreme Court of Alabama Does Not Conflict with the Decisions of the State Courts of Last Resort.

Petitioner cites one decision from a state court of last resort, *Nature's 10 Jewelers v. Gunderson*, 648 S.W.2d 804 (S.D. 2002), and admits that it does not conflict with the decision of the Supreme Court of Alabama. Pet. 18. Respondent has not located any decision of a state court of last resort decided after *First Options* that differs from the decision of the Supreme Court of Alabama on the facts of this case.[12] There is no conflict.

III. THE DECISION OF THE SUPREME COURT OF ALABAMA DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Nor does the inherent importance of the question raised by this case to the federal and state courts of the nation warrant certiorari. Simply put, a brokerage company's hiring of a fugitive from justice who registers under a criminal alias with securities authorities, forges a signature on customer application forms, steals money from customers, and absconds

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[12] SAI also cites this Court to the decisions of several intermediate state appellate courts: *Riverwalk Apartments, LP v. RTM General Contractors, Inc.*, 779 So. 2d 537 (Fla. 2d DCA 2000); *Aste v. Metropolitan Life Ins. Co.*, 728 N.E.2d 629 (Ill. App. Ct. 2000); and *RPT of Aspen v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. Ct. App. Div. IV 1996). Pet. 18-19. These courts are not state courts of last resort. *See* FLA. CONST. art. V, § 3 (establishing Florida Supreme Court as state court of last resort); ILL. CONST. Art. VI, § 4 (same in Illinois); COLO. CONST. Art. VI, § 2 (same in Colorado). Because these courts are not state courts of last resort, their decisions are not appropriate for this Court's review. Sup. Ct. R. 10(b); *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997). In any event, these decisions are consistent, as Petitioner admits, Pet. 18-19, with the decision of the Supreme Court of Alabama in this case.

before law enforcement authorities can arrest him is, thankfully, a rare occurrence. Resolution of such a peculiarly fact-bound case would be of little practical importance to the federal and state courts. *Cf. Fuller v. Oregon*, 417 U.S. 328, 328 (1974). Accordingly, Petitioner's attempt to compel arbitration based on the forged signature of its fugitive employee was correctly decided against Petitioner and presents no issue warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 27, 2003

APPENDIX

CURITIES AMERICA, INC. NEW ACCOUNT APPLICATION X Brokerage or ___Non-Brokerage (check one)
Member NASD/SIPC (Brokerage account carried by National Financial Services Corp.)

Right RR # _____ 3 Letter RR Code _____ Print RR Name _____ 76

NFSC Account Number | Type Account (NFSC Only): X Cash ___Margin* ___Option* ___DVP* *additional forms required

NFSC Brokerage Instructions: (will be coded to HOLD all & reinvest in mutual fund unless if not marked)

	Hold	Send
Proceeds	X	___
Securities	X	___
Dividends	X	___

If HOLD, which Money Mkt Sweep: ___076 ___077 ___079 ___058 X083 ___084 (default is 076)

IF HOLD, for mutual funds reinvest in: ___Shares or ___Money Mkt IF SEND: W M SM Q

IF HOLD, for stocks reinvest in: ___Shares (DRIP Application Required)

Registration:
Circle One: Individual Joint w/ Rights Comm Property TSA Non-NFS IRA Non-NFS SEP Non-NFS Roth Non-NFS Educ. UTMA/UGMA
Ten in Comm ___% ___% Partnership* Corp* Non-Corp* Trust* Estate* Indv TOD* Joint TOD* Non-NFS PSP/MPP* *additional papers required

Account Registration and Mailing Address (make sure client's address is indicated in addition to Third Party Custodian/TTEE address) Soc Sec/Tax ID #
George C. Edwards + Betty B. Edwards 261-72-7833
2527 N.W. 66th Terrace
Requires Legal Street Address in addition to any PO Box mailing address) Co-Owner Soc Sec #
(Betty) 411-86-1145
Gainesville State FL Zip 32606 Phone (352) 376-5461 Third Party Tax ID #
Client E-mail Address

Owner Birthdate 8-28-44 X US Citizen Annual Income 175,000 Tax Bracket (circle one):
Co-Owner Birthdate 6-22-48 ___Non-Res Alien ___Res Alien Net Worth 500,000 0% 15% 28%
___ Passport # ___ Liquid Net Worth 150,000 31% 38% above 38%

Investment Knowledge (choose one): ☐ Limited ☒ Good ☐ Excellent
Risk Exposure (choose one): ☐ Low ☒ Moderate ☐ Aggressive ☐ Speculation
Investment Objective (choose one): ☐ Current Income ☐ Balanced ☒ Growth & Income ☐ Growth ☐ Maximum Growth
Investment Experience: ☐ None ☒ Mutual Funds: 10 # yrs ☐ Partnerships: ___ # yrs ☐ Variable Products: ___ # yrs
☒ Stocks: 10 # yrs ☐ Bonds: ___ # yrs ☒ Equity Options: 10 # yrs ☐ Index Options: ___ # yrs

Primary Holder: Employer Name/Occupation self employed / Publisher
Joint Holder: Employer Name/Occupation self employed / Publisher
If not employed (choose one): ☐ Retired ☐ Student ☐ Other ___ And indicate source of income: ___
If any member of client's immediate family is employed by a Bank, Insurance Co., Investment Advisor or Broker, please indicate the name, relationship, and address of firm.
Name ___ Address ___ Relationship ___
Indicate the Public Corp. where the client or client's immediate family has ever been a corporate officer, director or 10% owner. Name ___

Under penalties of perjury, I (we) certify (1) the number shown on this form is my correct Taxpayer ID Number, and (2) I am not subject to backup withholding as a result of failure to report all interest or dividends, or (3) the Internal Revenue Service has notified me that I am no longer subject to backup withholding. Cross out (3) if subject to backup withholding. I understand that SAI will disclose my name to issuers of securities if securities are held in my account so that I can receive important information unless I notify SAI in writing that I do not consent. I further certify that I am at least 18 years of age and am of full legal age in the state in which I reside. I HEREBY ACKNOWLEDGE THAT I AM IN RECEIPT AND HAVE READ, UNDERSTOOD AND AGREED TO THE TERMS SET FORTH IN THE SAI CLIENT AGREEMENT AND THAT THIS ACCOUNT IS GOVERNED BY A PRE-DISPUTE ARBITRATION AGREEMENT WHICH I HAVE READ AND UNDERSTAND.

George C Edwards — Date — Betty B Edwards (BETTY) — Date
Client Signature — Client Signature

Registered Representative Signature — Date — OSJ Manager/Regional Supervisor Approval — Date

1196 (1/00)

BEST AVAILABLE COPY

77

ag Authority: ____ Full ____ Limited Trading Authority Name: _____ Relationship _____
itional forms required

icate Confirmations & Statements

nfirmations and Account Statements will be mailed to the client registration, the registered representative and any Third Party dian/Trustee whose address is listed in the registration section of the New Account Application. Please list any additional duplicate rmation and statement requests below:

_____ _____

_____ _____

_____ _____

_____ _____

itional Joint Holders:

me	Birthdate	Social Security Number	Employer Name	Occupation.
me	Birthdate	Social Security Number	Employer Name	Occupation.

ECIAL NOTICE TO CUSTOMERS WHO PURCHASE SECURITIES PRODUCTS THROUGH A REGISTERED EPRESENTATIVE AT A BANK, SAVINGS & LOAN, CREDIT UNION OR OTHER FINANCIAL DEPOSITORY INSTITUTION:

ities products purchased or sold through a Securities America, Inc. branch office located on a financial institution's premise:

are not insured by the FDIC;
are not deposits or otherwise obligations of the financial institution;
are subject to investment risk, including possible loss of principal invested; and
are not insured by the SIPC as to the loss of principal amounts invested.

stablish a **Periodic Investment Plan (PIP)** or a **Systematic Withdrawal Plan (SWP)** on a Brokerage Account, please complete the parate form required to establish this service and attach it or send it in separately. Be sure to reference the client account number.

stablish different distribution options for each mutual fund position in your Brokerage Account, please complete the separate **DRIP** ...1. The mutual fund position must be in the account to code a different distribution option other than the basic account coding structions.

stablish a **Cash Management Account** with check-writing privileges, please complete a VIP or Brokerage Access application and an ldendum.

...porary accounts may be opened for CASH accounts that do not required additional paperwork (e.g., trust accounts cannot be assigned mporary account numbers). Temporary account numbers are only given when immediate trading is necessary.

KE CHECKS PAYABLE TO NATIONAL FINANCIAL SERVICES CORP. for all BROKERAGE ACCOUNTS. Make checks payable Securities America, Inc. for Non-Brokerage business. If not a wire order, make check payable directly to the mutual fund, insurance mpany or name of the partnership for all Non-Brokerage transactions.

en making an investment through Securities America, Inc. the client should not make checks personally payable to the Registered ...ntative or any entity controlled by the Registered Representative.

Supreme Court, U.S.
FILED
JUL 8 2003
OFFICE OF THE CLERK

(3)

No. 02-1724

IN THE

Supreme Court of the United States

SECURITIES AMERICA, INC.,

Petitioner,

v.

CHARLES P. ROGERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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1. The Alabama Supreme Court's Decision Warrants Review by This Court Because It Undermines the Severability Doctrine of the Federal Arbitration Act.

The Alabama Supreme Court held squarely that "the trial court, as opposed to the arbitrator, must decide the ultimate question relating to the *legality*" of the "contract that contains a provision requiring that all claims arising therefrom be arbitrated." *SAI v. Rogers*, 2002 Ala. LEXIS 329, Pet. App. at 9a (quoting *Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 315 (Ala. 2000)) (emphasis added).

As SAI demonstrated in its Certiorari petition, this holding – like the holdings of several other state courts[1] – undermines the severability doctrine established by Section 4 of the Federal Arbitration Act and *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 403-404 (1967), and its progeny. By interjecting the courts into the proceedings even though the making of the agreement to arbitrate is not in issue, the Alabama Supreme Court offends the primary purpose of the FAA, that arbitration agreements be placed on equal footing with all other contracts. *Southland Corp. v. Keating*, 465 U.S. 1, 16-17, n.11 (1984).

2. Respondents Do Not Defend the Alabama Supreme Court's Decision.

In opposing certiorari, Respondents ignore the decision of the Alabama Supreme Court under review and argue legal

1. *E.g.*, *Riverwalk Apartments, LP v. RTM Contractors, Inc.*, 779 So. 2d 537 (Fla. Dist. Ct. App. 2000); *Aste v. Metropolitan Life Ins. Co.*, 728 N.E.2d 629 (Ill. App. 2000); *Nature's 10 Jewelers v. Gunderson*, 648 S.W.2d 804 (S.D. 2002); *RPT of Aspen v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. Ct. App. 1996).

issues that were never raised before either the trial court or the Alabama Supreme Court. The decision under review was based on the court's determination that Wolas was not registered under the Alabama Securities Act and that therefore the Account Agreements and the arbitration clauses therein were unenforceable under Alabama Code § 8-6-19(g).[2] Pet. App. at 9a-11a. The court found that Respondents did not dispute the existence of the contracts or their applicability to this dispute. Pet. App. at 9a. Respondents now argue in their brief to this Court that by executing the Account Agreements on behalf of SAI using his alias "Allen Hengst", Wolas committed the crime of forgery. Thus, they argue SAI did not assent the agreements and the contracts never came into existence.[3]

This "forgery" concept appears for the first time in Respondents' Brief to this Court. Although some form of the word "forgery" appears on the first page and 26 more times in their Brief in Opposition to Petition For Writ of Certiorari, neither the word nor the concept appear in the

2. That, as Respondents correctly note, the facts of this case are unusual, does not make this a "fact-bound" case. The sole fact on which the Alabama Supreme Court based its decision that the arbitration agreement was unenforceable was simply that Wolas lacked a securities license. Pet. App. 10a.

3. This argument itself lacks merit – Respondents cite no authority in which a party seeking to enforce an agreement is barred from doing so because the signature of its agent was forged. Respondents' citation to the 1967 edition of WILLISTON ON CONTRACTS is to a section dealing specifically with bills of exchange and promissory notes, contracts that bear only the signature of the person to be charged with performance. *Cf.* Ala. Code § 8-9-2 (an agreement subject to the Alabama statute of frauds is enforceable if signed by the party to be charged with performance).

decision under review; nor in any of the nine briefs filed before the Alabama Supreme Court; nor in any of the briefs submitted to the trial court. In fact, in the entire 581 page record there is not a single instance of any form of the word "forge" or "forgery." Prior to filing their brief in this Court, Respondents never made any attempt to argue forgery or any related concept.[4] Similarly, neither forgery nor any related concept formed any part of the Alabama Supreme Court's decision. It is entirely improper for Respondents to raise this issue now. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("in the ordinary course we do not decide questions neither raised nor resolved below"); *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 522 (1991) (refusing to consider issue raised for the first time in response to a petition for writ of certiorari).

By arguing forgery, Respondents hope to suggest that the factual existence of the contract is at issue and to thereby harmonize this case with those Court of Appeals cases where the factual making of the arbitration agreement was at issue.

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4. Two further points need to be made about Respondent's "forgery" innovation. First, the record is entirely silent on whether the Librarian Allen Hengst authorized Wolas to use his name. (The record does reveal that the Librarian knowingly sheltered Wolas when Wolas fled New York. (*See* Pg. 539 of the record on appeal). Second, the record is clear that Wolas used "Allen Hengst" as an alias, that is, when he signed the name "Allen Hengst" he was signing the name by which identified himself and by which he was known to all. Pet. App. 6a (citing Respondent's Complaint). The signature of an alias, by itself, is not a forgery. *Tucker v. State*, 184 So. 2d 366 (Ala. App. 1966) (where defendant signed one of the names by which he was known he could not be convicted of forgery); *see also French American Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 752 F. Supp. 83 (S.D.N.Y. 1990) (the signing of an assumed name alone does not constitute forgery).

Those cases are inapplicable here. Not only have Respondents never before raised the forgery issue, they never challenged the factual "making" of either the arbitration clause or of the contract as a whole. As the Alabama Supreme Court held, Respondents conceded that they assented to the Account Agreements. Pet. App. 9a. (*See also* Pgs. 9-11 of record on appeal). Their challenge is only to the legality of those agreements.

Respondents' attempt to divert attention away from the Alabama Supreme Court's opinion serves two purposes. First, Respondents avoid having to support the Alabama Supreme Court's frankly erroneous refusal to even cite, much less follow, federal law. Second, by ignoring the Court's actual reasoning, Respondents downplay the split of authority between the decision of the Alabama Supreme Court and other state courts on one hand[5] and the decisions of the Fourth, Fifth, Sixth, Seventh and Eleventh Circuits on the other.[6]

Respondents' contention that *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), controls this case is erroneous because, as explained above, the issues litigated below concerned "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Green Tree Fin'l Corp. v. Bazzle*, 2003 U.S. LEXIS 4798, *16 (Jan. 23, 2003). Under Respondent's reasoning,

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5. *See* cases cited in note 1, *supra*.

6. *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987); *Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001); *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress, Int'l*, 1 F.3d 639 (7th Cir. 1993); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002).

the question of "arbitrability," that is, whether "the parties agree[d] to submit the arbitrability question itself to arbitration," *First Options*, 514 U.S. at. 943, is raised every time there is a challenge to the legality of the underlying contract. This cannot be so. The defense of illegality, *see* Ala. R. Civ. P. 8(c), no more raises a "question of arbitrability" than does the defense of fraud in the inducement. *Prima Paint*, 388 U.S. at 403-406.

The question presented to the Alabama Supreme Court is the same as the question presented by this Petition: under the Federal Arbitration Act does the severability doctrine insulate arbitration agreements found in other agreements from allegations that the underlying agreements are illegal where no challenge is made to the legality of the arbitration agreement itself? This Court should answer that question in order to eliminate the confusion that has arisen among lower courts regarding the application of *Prima Paint* and Section 4 of the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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